

THE POSITION OF THE LAW AND THE JUDICIARY REGARDING THE STATE OF EXCEPTIONAL CIRCUMSTANCES AND EXCEPTION SYSTEMS - A COMPARATIVE STUDY BETWEEN FRENCH LAW AND IRAQI LAW

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ABSTRACT

The research aims to study the exceptional legal systems that the state applies in the event that it is exposed to unusual circumstances to ensure the regularity of the public facilities that make up its institutions. Through a comparative study between Iraq and France. This research included three basic sections: The first section dealt with the concept and classification of exception systems. While the second section dealt with the legal basis for the state of exceptional circumstances and exception systems and the conditions for their application, the third section dealt with the position of the law and the judiciary on the state of exceptional circumstances and exception systems. This research reached a number of results, the most important of which was that the exceptional legal systems adopted to confront the abnormal circumstances to which the state is exposed are represented by the martial law and emergency laws, which, when applied, have consequences that affect the rights and freedoms regulated by the law. The research also came up with a number of proposals, the most important of which was the need for the national legislator to move away from the martial law system as much as possible and replace it with the emergency law to defend national safety, provided that the latter is temporary and ends with the end of the situation that necessitated its application, while activating various control systems to ensure the administration's compliance with the provisions. Legitimacy, and also requires the enactment of a new law regulating exceptional regimes instead of the amended National Safety Law No. (4) of 1965 and the Defense of National Safety Order No. (1) of 2004 because they are not consistent with the Iraqi Constitution of 2005.

INTRODUCTION

The state's general legal system is based on its constitution, whose rules and provisions are superior to others, in normal circumstances. But when the state is exposed to a serious danger that threatens its entity or the existence of its people, the matter is different. The constitution often regulates the mechanism for dealing with these exceptional, unusual circumstances and the methods to prevent them with the least possible losses, the least percentage of sacrifice to the principle of legality, and the shortest expected period. Perhaps one of the most important of these mechanisms is to suspend the implementation of some constitutional and legal texts for a specific period or not to restrict them temporarily until the exceptional circumstances disappear. The theory of exceptional circumstances has emerged as one of the legal foundations justifying the imposition of a state of emergency and exception systems, by giving the administration the appropriate means to confront cases in which it is difficult to apply the principle of legality in its normal context. Which leads to a shift towards applying the principle

of exceptional legality to prevent obstruction of ensuring the principle of continuity of public facilities and maintaining public order. In light of these exceptional circumstances, guarantees of human rights and fundamental freedoms require the activation of laws capable of deterring exceptional authorities from violating the principle of exceptional legality by subjecting them to at least oversight, in order to achieve the public interest. Exceptional circumstances vary according to the various classifications of exception systems, including the state of emergency, and the state of imposing martial law, from other exception systems that were introduced under certain constitutional texts.

The First Section: Research Methodology

1-1- Research problem:

Granting the executive body broad exceptional powers to confront exceptional circumstances often leads, in practice, to restricting individual rights and freedoms stipulated in the Constitution and relevant laws. Therefore, the actions and actions of that authority must be subject to judicial oversight to ensure their proper application of the principle of exceptional legality, the rules of which vary according to the circumstances. In the exceptional case and for the legal regulation of that legitimacy, those rules may be governed by a constitutional system, as is the case with Article (16) of the French Constitution of 1958 in force. They may be regulated by legislative texts, as is the case with emergency laws, martial law laws, and national safety laws. These circumstances may not be governed by pre-defined legal rules, but rather imposed by the circumstances of the situation. Therefore, jurisprudence and administrative jurisprudence have concluded that the departure of the concerned authorities from the principle of legality must be accompanied by submission to the law. Its actions are subject to judicial oversight to ensure the necessity and appropriateness of the action taken.

1-2- Research importance:

The importance of the research came from the importance of legal regulation represented by emergency laws, one of the most important forms of the state's response to exceptional circumstances with prior legal rules. Therefore, most countries in the world were concerned with organizing the state of emergency in a legal manner that balances the exceptional powers granted to the competent authority and its subjection to political or judicial oversight, as there is Some administrative measures that violate normal legal rules in normal circumstances. These measures are exceptionally legitimate in some other circumstances, due to their importance in ensuring public order and the proper functioning of public facilities, in the event that several conditions are met, namely the existence of an exceptional circumstance and the difficulty of confronting it by normal means.

1-3- Research objectives:

This research aims to study the exceptional legal systems that the state applies in the event that it is exposed to unusual circumstances to ensure the regularity of public facilities that make up its institutions through a comparative study between Iraq and France.

1-4- Research hypothesis:

The research is based on a basic hypothesis that: The exceptional legal systems adopted to confront the abnormal circumstances to which the state is exposed are represented by the martial law and emergency laws, the application of which results in consequences that affect the rights and freedoms regulated by the law.

1-5- Research methodology:

The descriptive and analytical approach was relied upon when writing this research by defining the topic to be researched, describing the topic through the available information, developing questions and hypotheses, then delving into the study and identifying the causes of the problem, and finally analyzing the results and developing solutions. The descriptive analytical approach is one of the scientific research methods capable of accurately analyzing the problem or phenomenon of scientific research, and identifying the reasons for its occurrence, which helps to reach accurate conclusions, results, and solutions to it.

The second topic: The theoretical framework for exceptional circumstances and exception systems:**2-1- The concept and classification of exception systems:**

The theory of exceptional circumstances finds its roots in the rulings of the administrative judiciary, and in the laws or legislation that regulate the exceptional authorities that carry out their duties in those circumstances, whether prior or subsequent to them. Thus, this theory has two foundations: the judicial basis brought by the French Council of State, and the legal basis embodied in the laws, legislation, and regulations that regulate exceptional cases and powers (Abdel Majeed, 2000: 7).

The exceptional powers granted to the administration under exceptional circumstances differ from the powers granted to it under legal texts. Exceptional circumstances justify the administration in exercising broader powers than the powers specified in the laws. Administrative decisions issued based on exceptional administrative powers remain subject to the oversight of the administrative judiciary, so that it is permissible to request a ruling to invalidate them and compensate for them (Al-Qaisi, 2007: 186).

Thus, it is a sudden situation in which the state is threatened by internal or external dangers, or a situation that threatens the security of the country, the integrity of its borders and territories, its constitutional institutions, the nature of its political, economic and social system, or the unity of its territory, independence and sovereignty, which requires taking all the various exceptional measures to ward off dangers and return things to their normal state. This requires going beyond the procedures and conditions established in normal circumstances governed by the principle of normal legality (Al-Sharifi, 2011: 6).

Article (16) of the Constitution of the Fifth French Republic issued in 1958 regulated the system of exception, according to which the President of the Republic was granted broad powers to confront the state of exceptional circumstances facing the state, to the point where he is able to establish presidential laws that are far from judicial oversight. The state of emergency gives the supreme military authority the right to refer crimes against the security

of the state, the constitution, and public security and safety before the military court, even if these crimes occurred outside the territories in which a state of emergency was declared or the military zone, and crimes of crossing the border with the intention of acts of aggression or breach of security (Saad, 2006). : 133).

At the level of international agreements, Article (4) of the International Covenant on Civil and Political Rights of 1966 stipulates that in cases of exceptional emergency that threatens the life of the nation and whose establishment is officially declared, the States Parties to this Covenant may take measures within the narrowest limits required by the situation. It shall not abide by its obligations under this Covenant, provided that these measures are not inconsistent with its other obligations under international law and do not involve discrimination whose only justification is race, colour, sex, language, etc.

Although there is no description of the state of emergency in Article (15) of the European Convention on Human Rights of 1950, it is the objective conditions for its establishment, as it stipulates that in the event of war or a general danger that threatens the life of the nation, each High Contracting Party may take measures that contradict The obligations stipulated in this Charter shall be within the narrowest limits required by the situation and provided that these measures do not contradict the rest of the obligations emanating from international law. While Article (27) of the American Convention on Human Rights of 1969 was more clear when it stipulated the state of emergency and its objective conditions, as it stipulated that the state party cannot, in times of war, public danger, or other emergency situations that threaten the independence or security of the state It may take measures to limit its obligations under the current agreement, but only to the extent and for the period required by the necessities of the emergency situation, provided that such measures do not conflict with its other obligations under international law and do not involve discrimination on grounds of race, colour, sex, language, religion or social origin.

2-2- The legal basis for the state of exceptional circumstances, the exception systems, and the conditions for their application:

The legal foundations for the state of exceptional circumstances and exception systems are summarized in acts of sovereignty and regulations of necessity, so this requirement will be divided into three branches:

Section One: Acts of Sovereignty: It is required by the theory of acts of sovereignty that there are some acts carried out by the administrative authority that remain far from the oversight of the administrative judiciary and thus become not subject to appeal by invalidation for exceeding the limit of authority. As for determining the specific standard for acts of sovereignty, it has undergone several developments, as it was the first A criterion that has emerged to determine the actions of sovereignty is the basis of the motivation behind the executive body's issuance of its actions. If it is political, it is not subject to the oversight of the administrative judiciary, and if it is non-political, it is subject to the oversight of the administrative judiciary. Thus, the scope of the acts of sovereignty expanded and was excluded from the oversight of the administrative judiciary. It became a threat to the rights and freedoms of individuals because they were unable to challenge the actions of the executive

body that affected them before the judiciary. After abandoning the first standard, the objective standard appeared for determining the nature of the work issued by the executive body. If the work is government, it represents the job. Government is an act of sovereignty, and therefore outside the scope of administrative judiciary control. While administrative work is not within the scope of sovereign work and is therefore subject to judicial oversight. Due to the difficulty of distinguishing between governmental and administrative actions in many political and constitutional systems, as well as the ambiguity of this criterion, it was also abandoned (Al-Wakeel, 2013: 65).

Section Two: The Theory of Necessity: The Theory of Necessity is the basis of exceptional power, and it is a legal system that was created to confront unusual realistic situations, that is, exceptional circumstances. The German constitutions built the Theory of Necessity, which emphasized that the state is the one that created the law to achieve its interests, so it is not subject to it if those are achieved. Interests are incompatible with its provisions, because the law is a means to an end, which is the protection of the group. If the government encounters dangerous circumstances that threaten public safety and expose the country to dangers, then it can confront the situation by taking quick measures that are originally within the jurisdiction of the legislative authority. Parliament must then rectify matters by subsequently ratifying what was issued in violation of the law, as the constitution of the eighth year of the French Revolution in 1799 adopted this theory, and French jurisprudence surrounded it with three conditions: (Jamal al-Din, 2018: 13)

1. The emergence of an imminent national danger, such as a foreign war, an armed revolution, or a general strike that includes all employees.
2. The impossibility of Parliament meeting to take quick legislative measures, or the inability to wait for its meeting due to the urgent danger that exists if the parliament is outside the constitutional session.
3. To take rapid measures, provided that they are presented to Parliament at its first meeting.

It is worth noting that the French administrative judiciary did not adopt this theory in its entirety because the purpose of the law outweighs the strength of its provisions and because it is unpalatable for the provisions of the law to collapse completely in the face of force. Adopting this theory in sudden dangerous circumstances exposes the threatened public interests to additional danger and leads to chaos and lack of security and safety (Dominique and Proper, 2009: 58-59).

Section Three: Maintaining public order and public facilities: The idea of public order is a relative and flexible idea that varies philosophically from one country to another and from one time period to another in the same country. This represents a legal and social phenomenon aimed at preserving the foundations, values and principles on which society is based and which it is not permissible to violate under any circumstances, otherwise society itself will disintegrate during the period. These rules find their source in laws, custom, or judicial rulings, and are characterized by flexibility and relativity and differ according to the prevailing political, social, and economic system in the country. The interest of the French Council of

State in granting the administration the powers necessary to maintain public order has inspired diligence in this field. The lower security authority retains its ability to make the measures taken by the higher authority more coercive. The mayor can tighten and determine the provisions of the road system in his governorate. He can also prevent the showing of a film that has obtained a ministerial investment license when this showing is likely to lead to serious disturbances or It may be harmful to public order due to the immoral nature of the film and local circumstances. Hence, the idea of public order is understood in a broad sense to include the material order represented by security, health safety, public tranquility, and respect for human dignity, even reaching ethics. Jurisprudence is almost unanimous that the comprehensive public order includes the material or traditional public order: public security, public tranquility, and public health, in addition to the protection of public morals. As a result of the interventionist development of the state in all areas of life, the goals of administrative control expanded to include the public system that achieves the interests of individuals, so the idea of a specialized public system appeared, which gives private administrative control bodies the tasks of preserving this system under special legislation, as in the case of the public economic system (Al-Khoury, 2014: 283). .

The third topic: The position of the law and the judiciary regarding the state of exceptional circumstances and exception systems:

3-1- The position of the law regarding the case of exceptional circumstances and exception systems:

Article 16 of the French Constitution of 1958 stipulates: When the institutions of the Republic, the independence of the nation, the integrity of its territories, or the implementation of its international obligations are threatened by a grave and immediate danger, and this results in the cessation of the constitutional public authorities from carrying out their duties as usual, the President of the Republic shall take The procedures required by these circumstances after official consultation with the Prime Minister, the heads of councils, and the Constitutional Council, and then directing a statement to the people, and the purpose of these procedures must be to enable the constitutional public authorities to carry out their duties as soon as possible (Abdullah, 2008 : 48-49).

The Constitutional Council shall be consulted regarding these procedures, and Parliament shall meet by force of law. The National Assembly may not be dissolved while exercising these exceptional powers. After thirty days have passed from the implementation of the exceptional powers, the President of the National Assembly or the Senate, or sixty deputies or sixty members of the Senate, may notify the Constitutional Council for the purpose of examining whether the conditions stipulated in the first paragraph still exist. The importance of explaining the justifications for declaring a state of emergency in Iraq, especially after the constitutional legislator distinguished between it and a state of war, even though he subjected them to the same organization and procedures. It is also necessary to determine the entity that determines the seriousness of the imminent danger threatening the state and its people, which prompts the bodies of state authority to consider it an exceptional circumstance. The Constitutional Council decides on this matter publicly and quickly (Badran, 2012: 44).

He must consider and decide under the same conditions at the end of the sixty-day period of operation of the exceptional powers and at any time after the expiry of this period. This article is considered one of the most famous articles of the constitutional exception systems, as it is a comprehensive regulation of the periods of crises that France is likely to go through, as it granted the President of the Republic broad powers to take the measures required by those circumstances, with the aim of enabling public constitutional bodies to carry out their tasks normally as soon as possible (Youssef (2009: 25).

Clause (Ninth) of Article (61) of the Iraqi Constitution of 2005 stipulates (a state of emergency), as it states the following:

- a. Approval of the declaration of war and a state of emergency by a two-thirds majority, based on a joint request from the President of the Republic and the Prime Minister.
- b. A state of emergency is declared for a period of thirty days, which can be extended and approved each time.
- c. The Prime Minister is empowered with the necessary powers that enable him to manage the country's affairs during the period of the declaration of war and the state of emergency. These powers are regulated by law in a manner that does not conflict with the Constitution.
- d. The Prime Minister shall present to the House of Representatives the measures taken and results during the period of the declaration of war and the state of emergency within fifteen days from the date of its expiration.

The order also made the final approval for declaring a state of emergency in Iraq rest with one of the two bodies of executive authority, which is the Presidency, and granting exceptional powers to the second body of executive power, which is the Prime Minister.

Whatever the case may be, the Iraqi Constitution of 2005 has supremacy over National Safety Order No. (1) of 2004, and it is also the newest law that supersedes the older one, so this order should be amended first, and then a new law should be enacted that regulates exceptional cases in Iraq according to what is stated in The Constitution secondly, and then the new law included a clause repealing that matter thirdly.

Regarding the subjection of exceptional powers to oversight, the constitutional text affirmed that the Prime Minister must present to the House of Representatives, fifteen days after the end of the state of emergency, the exceptional measures taken during the period of declaring the state of emergency and the results they achieved that helped confront the exceptional circumstances. To consider it and take the appropriate decision thereon. It is clear that the constitutional legislator has tended to adopt political oversight represented by the oversight of the House of Representatives. It would have been better for the Iraqi constitutional legislator to rely on administrative judicial oversight because it falls within its jurisdiction, in accordance with Clause (Second) of Article (7) of the Second Amendment Law No. 106 of 1989 to the State Shura Council Law No. 65 of 1979.

3-2- The position of the judiciary regarding the state of exceptional circumstances and exception systems:

The French Council of State, with its numerous rulings, established the theory of exceptional circumstances. However, the French ordinary judiciary denied this theory in some of its rulings. The French Court of Cassation on May 31-June 1918 refused to consider it as a reason

for deviating from the rules of legality. The Egyptian ordinary judiciary followed the same approach, as the Egyptian Civil Court of Appeal refused on December 10, 1932, to recognize the measures taken by the public authorities based on exceptional circumstances. In a ruling by the Mixed Court of Egypt on September 26, 1932, the administrative authorities were prevented from exceeding the limits stipulated by the legislator, even in exceptional circumstances (Al-Sharifi, 2011: 36).

Despite this, the trend rejecting the theory of exceptional circumstances did not prevail as was the case with the trend supporting it, although it sought to narrow the cases of exceptional circumstances and reduce their scope. The administrative judiciary has subjected the procedures and actions taken by the administration in the face of exceptional circumstances to its oversight, in order to ensure the occurrence of the exceptional circumstance. Indeed, it is not fictitious, and there is correlation and proportionality between it and those procedures.

1. The importance of explaining the justifications for declaring a state of emergency in Iraq, especially after the constitutional legislator distinguished between it and a state of war, even though he subjected them to the same organization and procedures. It is also necessary to determine the entity that determines the seriousness of the imminent danger threatening the state and its people, which prompts the bodies of state authority to consider it an exceptional circumstance. This is because the expansion of the scope of legality in exceptional circumstances does not mean that the administration's actions during those circumstances are outside the scope of administrative judiciary (Abdullah, 2008: 49).

In France, the French administrative judiciary moved towards reducing cases of exceptional circumstances, after it considered the war to justify in itself the application of the theory of exceptional circumstances, as it is a living example of these circumstances in cases arising from the First World War. He came to have a different opinion on issues arising from World War II, as he no longer considered it an exceptional circumstance in and of itself, but rather a distinction must be made between one era and another. He recognized the existence of exceptional circumstances between May and September of 1940, and then in the period between the date of the landing on the beaches of Normandy and the date of the liberation. France. In addition, the Council refused to apply the theory of exceptional circumstances except in special cases (Al-Khoury, 2014: 268).

After 2005, the Iraqi judiciary did not issue many decisions regarding defining the exceptional circumstance and the exceptional authorities undertaking their extraordinary tasks to ward off the grave dangers resulting from those circumstances. But we sensed the position of the Iraqi judiciary regarding some aspects of the exceptional circumstances in one of the decisions of the Federal Supreme Court, as well as in one of the rulings of the presidency of the Nineveh Court of Appeal during this period.

In the interpretation of the Federal Supreme Court contained in its decision No. (278/T/2006) issued on 12/6/2006, based on the request of the House of Representatives in its letter No. (130) dated 11/29/2006 regarding the request for interpretation of clauses (a) and (B) From Paragraph (Ninth) of Article (61) of the Iraqi Constitution of 2005 regarding the concept of (two-thirds majority) mentioned in Clause (A) when declaring a state of emergency. Does it mean two-thirds of the members of the House of Representatives, a two-thirds majority of the

members of the House of Representatives, or a two-thirds majority of those present in the session in period? .

The request also included asking the House of Representatives whether it could authorize the Presidency of the House of Representatives to agree to extend the state of emergency in accordance with what is stipulated in Clause (B) of Paragraph (Ninth) of Article (61) of the Constitution when it is not possible to achieve the majority stipulated in Clause (a) mentioned earlier. The importance of explaining the justifications for declaring a state of emergency in Iraq, especially after the constitutional legislator distinguished between it and a state of war, After scrutiny and deliberation, the Federal Supreme Court, in its session held on 12/6/2006, reached the following:

1. The two-thirds majority intended in Clause (A) of Paragraph (Ninth) of Article (61) of the Constitution required when declaring a state of emergency is the two-thirds majority of the members of the House of Representatives present after achieving the quorum for holding the session stipulated in Paragraph (First) of Article (59) of the Constitution, because if the legislator wanted a two-thirds majority for all members of the House of Representatives, he would have stipulated that as stated in Paragraph (First) of Article (70) and Paragraph (Second) of Article (92) of the Constitution.

2. As for the question of whether the House of Representatives can authorize the Presidency of the Council to approve the extension of the state of emergency in accordance with what is stated in Clause (B) of Paragraph (Ninth) of Article (61) of the Constitution when the majority stipulated in Clause (A) cannot be achieved. From the same paragraph. The Federal Supreme Court found that the Constitution did not stipulate that the House of Representatives could delegate this power to the Presidency of the Council, although this was required in the event that the required majority was not achieved and in the event of the Council recessing or the end of its session, which requires taking this into account when proceeding to amend the Constitution by setting a text that allows that .

In Judgment No. (41 / T.J. / 2008) issued by the Presidency of the Nineveh Court of Appeal on 11/30/2008 in its capacity as a cassation body for the purpose of determining the competent court in the case under scrutiny, it was emphasized that the Sinjar Investigation Court is competent to hear the investigation because the incident The killing occurred within its jurisdiction, even if it was of a terrorist nature, in accordance with the provisions of Article (7 - First and Third) of the Defense of National Safety Order No. (1) of 2004. Therefore, it was decided to return the papers to the Central Criminal Investigation Court for the purpose of returning them to the Sinjar Investigation Court to complete the investigation into them. According to the rules.

Section Four: Conclusions and Recommendations:

4-1- Conclusions:

1. One of the most prominent exceptional systems adopted to confront the exceptional circumstances that threaten the state and its people is represented by the military martial law system imposed in the event of war and its areas, and the constitutional systems of exception, as in the content of Article (16) of the French Constitution of 1958, for example but

not limited to. And legislative exception systems, as in the content of emergency and national safety laws.

2. The constitutional legislator tended to adopt political oversight represented by the oversight of the House of Representatives when the constitutional text affirmed that the Prime Minister must present to the House of Representatives, fifteen days after the end of the state of emergency, the exceptional measures taken during the period of declaring the state of emergency and what they achieved. Of the results that helped in confronting the exceptional circumstances, to consider them and take the appropriate decision regarding them.

3. The legal organization of the state of emergency varies from one country to another, as do the methods of its implementation. The state of emergency legislation explains the reason for declaring it, determines the duration of its validity and the areas in which it is applied, and the subjection of emergency authorities to oversight.

4. The most important justification for imposing a state of emergency regime is that the state faces a serious danger as a result of war, invasion, disturbances, or a threat to security and public order. And the public authority is unable to confront this grave danger through its normal powers.

5. The provisions contained in the text of Clause (Ninth) of Article (61) of the Iraqi Constitution of 2005 included many objective and formal conditions that must be met, and then resort to applying one of the exception systems for a period of thirty days, subject to extension, with the approval of the House of Representatives. during this period.

4-2- Recommendations:

1. The importance of explaining the justifications for declaring a state of emergency in Iraq, especially after the constitutional legislator distinguished between it and a state of war, even though he subjected them to the same organization and procedures. It is also necessary to determine the entity that determines the seriousness of the imminent danger threatening the state and its people, which prompts the bodies of state authority to consider it an exceptional circumstance.

2. The importance of the judiciary being the body that determines that grave danger threatening the state or its elimination, on the basis of which resort to imposing a state of emergency regime and ending it.

3. The national legislator must move away from adopting a system of martial law to confront exceptional circumstances, and continue his trend of adopting a system of defending national safety.

4. We propose adding a constitutional text with a full article in which the same contents of Article 16 of the French Constitution of 1958 are formulated, due to its importance in confronting the grave dangers facing the state within the framework of regulating the application of the principle of exceptional legality in the face of emergency circumstances.

5. We propose to the Iraqi legislator to enact a new law regulating the use of exception systems instead of the Defense of National Safety Order No. (1) issued on July 3, 2004, which is currently in effect, due to its incompatibility with the provisions of the Iraqi Constitution of 2005, especially since the Constitution This matter is lofty, as it is the newer law that

supersedes the older one, so a new law should be enacted that regulates exceptional cases in Iraq in accordance with what is stated in the constitution.

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